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The Right to Appeal Against a Decision Made on an Interlocutory Application: The Immediate Aftermath of the 2010 Amendments

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THE RIGHT TO APPEAL AGAINST A DECISION MADE ON AN INTERLOCUTORY APPLICATION

The Immediate Aftermath of the 2010 Amendments

One of the main reasons for amending the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) in 2010 was to introduce a calibrated approach towards interlocutory appeals to the Court of Appeal. The amended s 34 and the newly introduced Fourth and Fifth Scheds were interpreted for the first time in two recent Court of Appeal decisions, providing much needed guidance on the general approach towards statutory interpretation, as well as specific direction in terms of interpreting the term "order" in para (*i*) of the Fourth Sched and para (*e*) of the Fifth Sched, and the term "interlocutory application" in para (*e*) of the Fifth Sched. However, some important questions remain to be answered, such as those relating to the meaning of the purposive approach, the framework to determine what are "interlocutory orders" and "interlocutory applications", the relationship between the relevant provisions in the Rules of Court (Cap 322, R 5, 2006 Rev Ed) relating to leave to appeal and the primary legislation, as well as the extent of possible future legislative change.

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I. Introduction

1 Singapore's Supreme Court of Judicature Act ("SCJA")[1] was amended in 2010 *vide* the Supreme Court of Judicature (Amendment) Act 2010 ("2010 SCJA amendments").[2] One key provision that saw change was s 34, which bears the ostensibly straightforward heading "Matters that are non-appealable or appealable only with leave".

1 Cap 322, 2007 Rev Ed.
2 Act 30 of 2010.

2 This change came about as one of the perennial conundrums in civil litigation is the extent to which appeals should be permitted to be brought to the appellate courts;[3] indeed, the primary purpose of amending s 34 was to introduce a calibrated approach towards interlocutory appeals to the Court of Appeal (the apex court in Singapore) in order to strike a better balance between utilising the Court of Appeal's resources to hear appeals from interlocutory applications concerning trite principles of law and allowing the Court of Appeal to continue developing the jurisprudence on critical areas of civil procedure law that may arise in interlocutory applications.[4]

3 The amended s 34 was interpreted for the first time in two recent decisions by the Court of Appeal[5] released just a couple of weeks apart: *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* ("*OpenNet*")[6] and *Dorsey James Michael v World Sport Group Pte Ltd* ("*Dorsey James Michael*").[7]

4 This piece analyses the reasoning in both decisions and also raises certain questions that hopefully can be resolved in due course. Before that is done, however, it is necessary to understand how and why the provisions relating to appeal in the SCJA had changed.

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3 See Jeffrey Pinsler, *Principles of Civil Procedure* (Academy Publishing, 2013) at pp 917–918:

> It might be argued that the parties should accept the decision given by a first instance court and that the availability of an appeal is an unnecessary luxury. The grounds for such a view could include: the rigorous and comprehensive nature of civil litigation which produces correct first instance decisions most of the time …; the unnecessary extension of litigation, as when a party is intent on achieving the result he wants irrespective of the merits, or when his motivation is to delay the enforcement of judgment which has been given against him or to simply protract the dispute; the costs which would have to be incurred in the course of the appeal and the related point that often only parties who are financially well-positioned can take their cases to the Court of Appeal …; the real possibility that the original dispute maybe adapted by new issues, evidence and amendments so that there is a shift in the scope of the adjudication; and the public's perception of inconsistencies within the court system when a higher court disagrees with a lower court.

4 Teo Guan Siew, "Recent Amendments to the Supreme Court of Judicature Act and the Subordinate Courts Act" (January 2011) *Singapore Law Gazette* <http://www.lawgazette.com.sg/2011-01/feature1.htm> (accessed 5 May 2013).

5 In the first case, the Court of Appeal comprised Chao Hick Tin, Andrew Phang and V K Rajah JJA. In the second case, the Court of Appeal comprised Sundaresh Menon CJ, and Chao Hick Tin and V K Rajah JJA.

6 [2013] 2 SLR 880.

7 [2013] 3 SLR 354.

II. The Statutory Scheme

A. Before the 2010 amendments

5 For the larger part of our history, appeals to the Court of Appeal in Singapore were subject to the principle that an appeal did not lie in respect of an interlocutory order in chambers unless the judge had certified after an application for further argument in court that he required no further argument.[8]

6 In this regard, the Court of Appeal in *Singapore Press Holdings Ltd v Brown Noel Trading Pte Ltd*[9] had explained that this requirement for certification contemplated situations in which appeals from interlocutory orders "may have arisen from full arguments not being presented to the judge in chambers due to the shortness of time available for the hearing of such applications or due to the judge in chambers having to decide on an issue without the time available to him for mature consideration".[10]

7 Previous versions of the SCJA also contained provisions governing matters that were appealable as of right, non-appealable or appealable only with leave. Over the years, the categories of cases where an automatic right of appeal lay to the Court of Appeal were narrowed, and those disqualifying an appeal to the Court of Appeal or requiring leave increased.

8 In introducing some of these earlier legislative amendments, Parliament had stated that their purpose was to check, screen or sieve out the number of unmeritorious, unimportant or non-serious appeals, especially on interlocutory matters.[11]

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8 Jeffrey Pinsler, *Civil Justice in Singapore – Developments in the Course of the 20th Century* (Butterworths Asia, 2000) at p 372, citing s 23(1) of the Courts Ordinance 1934 (Act 17 of 1934) and s 30(2) of the Courts Ordinance 1955 (Cap 3, 1955 Ed) as early formulations of the principle. More recent formulations were s 34(2) of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) and s 34(1)(*c*) of the Supreme Court of Judicature (Amendment) Act 1993 (Act 16 of 1993).

9 [1994] 3 SLR(R) 114.

10 *Singapore Press Holdings Ltd v Brown Noel Trading Pte Ltd* [1994] 3 SLR(R) 114 at [40], cited in *Lim Chi Szu Margaret v Risis Pte Ltd* [2006] 1 SLR(R) 300 at [31]; *cf Downeredi Works Pte Ltd (formerly known as Works Infrastructure Pte Ltd) v Holcim (Singapore) Pte Ltd* [2009] 1 SLR(R) 1070 at [22]–[25].

11 See *Singapore Parliamentary Debates, Official Report* (12 April 1993) vol 61 at col 96 (Professor S Jayakumar, Minister for Law) and *Singapore Parliamentary Debates, Official Report* (26 November 1998) vol 69 at col 1630 (Professor S Jayakumar, Minister for Law).

9 Before the 2010 SCJA amendments, the right of appeal to the Court of Appeal in respect of interlocutory orders was found in s 34(1)(*c*) of the then-existing SCJA.[12] That provision stated that no appeal shall be brought to the Court of Appeal "where a judge makes an interlocutory order in chambers unless the Judge has certified, on application within seven days after the making of the order by any party for further argument in court, that he requires no further argument".

10 This meant that where a judge-made order in chambers was concerned, it was crucial, in determining the extent of one's right to appeal, whether that order could be classified as "final" or "interlocutory"; where an order was "interlocutory", it would only be appealable to the Court of Appeal if the no-further-arguments-required certification was obtained.

11 However, once the requisite certification was obtained, the default position for orders made in interlocutory applications was that they were appealable as of right to the Court of Appeal unless otherwise provided for.[13]

12 In the larger scheme of the SCJA, pursuant to s 29A(1), "final" orders of a judge in chambers were appealable as of right, along with all other orders that were not subject to exceptions in the SCJA requiring leave to appeal or providing that there was no right to appeal.

13 The categories of cases which were non-appealable (excluding "interlocutory" orders made by a judge in chambers where the appellant failed to obtain the no-further-arguments-required certification) were as follows:

> (a) Where a judge made an order giving unconditional leave to defend an action or an order setting aside unconditionally a default judgment.[14]
>
> (b) Where the appellant was the plaintiff and a judge made an order giving leave to defend on condition that the defendant paid into court or gives security for the sum claimed or an order setting aside a default judgment on condition as aforesaid.[15]
>
> (c) Where the judgment or order was made by consent of the parties.[16]

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12 Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed).

13 Teo Guan Siew, "Recent Amendments to the Supreme Court of Judicature Act and the Subordinate Courts Act" (January 2011) *Singapore Law Gazette* <http://www.lawgazette.com.sg/2011-01/feature1.htm> (accessed 5 May 2013).

14 Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) s 34(1)(*a*).

15 Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) s 34(1)(*b*).

16 Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) s 34(1)(*d*).

(d) Where written law declared the judgment or order to be final.[17]

14 The categories of cases where leave to appeal was required were as follows:

(a) Where the amount or value of the subject-matter at the trial in dispute was less than $250,000.[18]

(b) Where the only issue in the appeal related to costs or fees for hearing dates.[19]

(c) Where a judge in chambers made a decision in a summary way on an interpleader summons where the facts were not in dispute.[20]

(d) An order was made refusing to strike out an action or a pleading or part of a pleading.[21]

15 As summarised in *Dorsey James Michael*, there were essentially three problems with this scheme.

16 First, there was considerable uncertainty as to the meaning of "interlocutory order".[22]

17 Second, although the no-further-arguments certification had a rational basis, in practice, a majority of further arguments did not raise fresh arguments and the failure to obtain the certification in time had potentially draconian effects on a party's right to appeal.[23]

18 Third, there was an upward trend in appeals to the Court of Appeal in respect of interlocutory orders, leading to a strain on the Court of Appeal to hear other appeals against judgments and final orders, delays in case management, and the unsatisfactory position that there were effectively two levels of appeal for interlocutory orders but only one for judgments or final orders.[24]

17 Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) s 34(1)(*e*).
18 Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) s 34(2)(*a*).
19 Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) s 34(2)(*b*).
20 Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) s 34(2)(*c*).
21 Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) s 34(2)(*d*).
22 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [27]–[29].
23 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [30]–[33].
24 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [34]–[40].

B. After the 2010 amendments

19 Accordingly, after careful consideration by two Committees led by the Judiciary – the Law Reform Committee of the Singapore Academy of Law chaired by Judith Prakash J, and the Committee to Review and Update the SCJA and the Subordinate Courts Act chaired by Chao Hick Tin JA – recommendations were made which led to the 2010 SCJA amendments.[25]

20 These recommendations were aimed, *inter alia*, at "streamlining of appeals to the Court of Appeal arising from interlocutory applications"[26] to strike a better balance between "maximising the use of the Court of Appeal's limited resources so that it can focus on substantive cases that help shape legal jurisprudence and, at the same time, allowing it to continue to shape [Singapore] jurisprudence in the area of interlocutory applications".[27]

21 The 2010 SCJA amendments essentially embodied a new three-pronged calibrated approach towards appeals to the Court of Appeal.[28]

22 Under this approach, to determine whether an order made on an interlocutory application was appealable to the Court of Appeal, one would have to determine which of the following three categories the order fell within: (a) non-appealable matters; (b) matters appealable only with leave of court; or (c) matters appealable as of right to the Court of Appeal.[29]

23 Non-appealable matters are listed in s 34(1) of the SCJA and comprise the following:

> (a) Where a judge makes an order specified in the Fourth Sched, except in such circumstances as may be specified in that Sched.[30]

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25 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [23].

26 *Singapore Parliamentary Debates, Official Report* (18 October 2010) vol 87 at col 1367 (Associate Professor Ho Peng Kee, Senior Minister of State, Ministry of Law and Ministry of Home Affairs).

27 *Singapore Parliamentary Debates, Official Report* (18 October 2010) vol 87 at col 1395 (Associate Professor Ho Peng Kee, Senior Minister of State, Ministry of Law and Ministry of Home Affairs).

28 See Chua Hui Han, Eunice, "Defining an 'Interlocutory Application' – *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] SGCA 24" (April 2013) Issue 2 *Singapore Law Watch Commentary* at 1–3 <http://www.singaporelawwatch.com/slw/index.php/commentaries> (accessed 5 May 2013).

29 Teo Guan Siew, "Recent Amendments to the Supreme Court of Judicature Act and the Subordinate Courts Act" (January 2011) *Singapore Law Gazette* <http://www.lawgazette.com.sg/2011-01/feature1.htm> (accessed 5 May 2013).

30 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(1)(*a*).

(b) Where the judgment or order is made by consent of the parties.[31]

(c) Where written law declares the judgment or order to be final.[32]

24 The main difference with the previous version of the SCJA was that the reference to specific types of orders (relating to unconditional or conditional leave to defend an action and setting aside unconditionally a default judgment or on certain conditions being imposed) and the broad category of "interlocutory" orders made by a judge in chambers where the appellant failed to obtain the no-further-arguments-required certification had been deleted and replaced with a list of orders specified in the Fourth Sched.

25 However, the Fourth Sched itself contains certain exceptions. It states that no appeal shall be brought to the Court of Appeal in the following cases:

(*a*) where a Judge makes an order giving unconditional leave to defend any proceedings;

(*b*) where a Judge makes an order giving leave to defend any proceedings on condition that the party defending those proceedings pays into court or gives security for the sum claimed, except if the appellant is that party;

(*c*) where a Judge makes an order setting aside unconditionally a default judgment, regardless of how the default judgment was obtained (including whether by reason of a breach of an order of court or otherwise);

(*d*) where a Judge makes an order setting aside a default judgment on condition that the party against whom the judgment had been entered pays into court or gives security for the sum claimed, regardless of how the default judgment was obtained (including whether by reason of a breach of an order of court or otherwise), except if the appellant is that party;

(*e*) where a Judge makes an order refusing to strike out —

(i) an action or a matter commenced by a writ of summons or by any other originating process; or

(ii) a pleading or a part of a pleading;

(*f*) where a Judge makes an order giving or refusing further and better particulars;

(*g*) where a Judge makes an order giving leave to amend a pleading, except if —

31 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(1)(*d*).

32 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(1)(*e*).

(i) the application for such leave is made after the expiry of any relevant period of limitation current at the date of issue of the writ of summons; and

(ii) the amendment is an amendment to correct the name of a party or to alter the capacity in which a party sues, or the effect of the amendment will be to add or substitute a new cause of action;

(*h*) where a Judge makes an order refusing security for costs;

(*i*) where a Judge makes an order giving or refusing interrogatories.

26 One will notice from this list that (*a*) to (*d*) are equivalent to ss 34(1)(*a*) and 34(1)(*b*) of the previous version of the SCJA. These categories have been consolidated in the Fourth Sched together with other types of interlocutory orders, thus representing only a change in form but not substance.

27 However, para (*e*) is equivalent to s 34(2)(*d*) of the previous version of the SCJA, meaning that one category of cases which had previously been appealable with leave has now been made non-appealable.

28 On this list, (*f*) to (*i*) are new categories which have been explicitly stated to be non-appealable. Before the 2010 SCJA amendments, these would arguably have fallen within the category of "interlocutory" orders that were appealable as of right once the no-further-arguments certification had been obtained.

29 As for the exceptional categories of cases stated in the Fourth Sched which are not non-appealable, one would have to take the further step to determine if they fell within one of the categories of cases where leave to appeal was required. If they did not, then they could be appealable as of right.

30 Matters appealable only with leave of court are stated under s 34(2) of the SCJA. They comprise the following categories of cases:

(a) Where the amount in dispute, or the value of the subject-matter, at the hearing before the High Court (excluding interest and costs) does not exceed $250,000.[33]

(b) Where the only issue in the appeal relates to costs or fees for hearing dates.[34]

33 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(2)(*a*).

34 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(2)(*b*).

(c) Where a judge in chambers makes a decision in a summary way on an interpleader summons where the facts are not in dispute.[35]

(d) Where a judge makes an order specified in the Fifth Sched, except in such circumstances as may be specified in that Schedule.[36]

(e) Where the High Court makes an order in the exercise of its appellate jurisdiction with respect to any proceedings under the Adoption of Children Act or under Pt VII, VIII or IX of the Women's Charter.[37]

31 In turn, the Fifth Sched of the SCJA provides that leave to appeal to the Court of Appeal is required in the following cases:

(*a*) where a Judge makes an order refusing leave to amend a pleading, except if —

(i) the application for such leave is made after the expiry of any relevant period of limitation current at the date of issue of the writ of summons; and

(ii) the amendment is an amendment to correct the name of a party or to alter the capacity in which a party sues, or the effect of the amendment will be to add or substitute a new cause of action;

(*b*) where a Judge makes an order giving security for costs;

(*c*) where a Judge makes an order giving or refusing discovery or inspection of documents;

(*d*) where a Judge makes an order refusing a stay of proceedings;

(*e*) where a Judge makes an order at the hearing of any interlocutory application other than an application for any of the following matters:

(i) for summary judgment;

(ii) to set aside a default judgment;

(iii) to strike out an action or a matter commenced by a writ of summons or by any other originating process, a pleading or a part of a pleading;

(iv) to dismiss an action or a matter commenced by a writ of summons or by any other originating process;

(v) for further and better particulars;

35 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(2)(*c*).
36 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(2)(*d*).
37 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(2)(*e*).

(vi) for leave to amend a pleading;

(vii) for security for costs;

(viii) for discovery or inspection of documents;

(ix) for interrogatories to be varied or withdrawn, or for leave to serve interrogatories;

(x) for a stay of proceedings.

32 One can immediately observe that the category of cases where leave to appeal is required has ballooned significantly – only ss 34(2)(*a*) to 34(2)(*c*) have counterparts in the previous version of the SCJA.

33 Additionally, although the previous distinction between "final" and "interlocutory" orders had been removed, para (*e*) of the Fifth Sched introduced a new category of an *order* at the hearing of *any interlocutory application*. This category of orders would require leave to appeal unless they fell within a sub-list of specified matters.

34 As with the Fourth Sched, the Fifth Sched also contains exceptions. Again, it is not immediately apparent if those categories of cases mentioned as exceptions would be appealable as of right or non-appealable. One would have to go through the exercise of determining if these same categories appeared in the Fourth Sched and if not, then by process of elimination they would be appealable as of right.[38]

35 All in all, it is clear that after the 2010 SCJA amendments, determining the extent to which an appeal to the Court of Appeal is available now requires a fairly complex exercise of statutory interpretation.

III. The two recent decisions interpreting the new provisions

36 The two recent decisions of *OpenNet* and *Dorsey James Michael* demonstrate this. They deal, most significantly, with the reference to "order" in para (*i*) of the Fourth Sched to the SCJA, as well as the phrase "an order at the hearing of any interlocutory application" in para (*e*) of the Fifth Sched.

37 Additionally, the Court of Appeal in *Dorsey James Michael* gave detailed guidance as to the general approach to be taken in applying s 34

38 Chua Hui Han, Eunice, "Defining an 'Interlocutory Application' – *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] SGCA 24" (April 2013) Issue 2 *Singapore Law Watch Commentary* at 3 <http://www.singaporelawwatch.com/slw/index.php/commentaries> (accessed 5 May 2013).

and the Fourth and Fifth Scheds of the SCJA to particular types of interlocutory orders.

A. OpenNet

38 The issue before the Court of Appeal in *OpenNet*[39] was whether the appellant required leave to appeal against an order made by a High Court judge in which leave to the appellant to commence judicial review proceedings was refused.

39 The respondent argued, *inter alia*, that leave was required because the application for leave to commence judicial review was an "interlocutory application" under para (*e*) of the Fifth Sched of the SCJA.[40]

40 According to the respondent, an application for leave to commence judicial review was "interlocutory" for three main reasons: (a) it was "a preliminary step to the substantive application for judicial review"; (b) it may be made by *ex parte* originating summons without the respondent being heard; and (c) the appellant had proceeded on the basis that the application was "interlocutory" because its affidavits in support of the application for leave stated that they contained statements of information or belief, which were admissible under O 41 r 5 of the Rules of Court[41] for "interlocutory proceedings".[42]

41 The Court of Appeal quickly (and correctly) dismissed the last reason on the basis that the appellant's subjective belief had no bearing on the proper interpretation of "interlocutory application" under the SCJA.[43]

42 It focused on how the SCJA *should* be interpreted instead. In this regard, the Court of Appeal noted that the SCJA provided no definition for the phrase "interlocutory application" and that a plain and ordinary meaning of the phrase based on the definitions in various legal dictionaries would seem to exclude an application for leave to

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39 For a summary and commentary of the case, see Douglas Chi, "Clarification on Leave to Appeal Regime in Respect of Interlocutory Matters – *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] SGCA 24" (April 2013) Issue 1 *Singapore Law Watch Commentary* <http://www.singaporelaw watch.com/slw/index.php/commentaries> (accessed 5 May 2013).

40 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [11].

41 Cap 322, R 5, 2006 Rev Ed. Order 41 r 5 bears the heading "Contents of affidavit".

42 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [11]–[12].

43 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [13].

commence judicial review from the category of "interlocutory" because there was no "main hearing determining the outcome of the case".[44]

43 More importantly, however, a purposive reading in context pursuant to s 9A(1) of the Interpretation Act[45] led to the same conclusion.

44 The Court of Appeal discerned the purpose of the SCJA from the second reading speech of then Senior Minister of State for Law, Associate Professor Ho Peng Kee, where he had explained that under the amended SCJA:[46]

> *Interlocutory applications will now be categorised based on their importance to the substantive outcome of the case.* With this calibrated approach, some interlocutory orders will not be allowed to go to the Court of Appeal, whilst others can only go to the Court of Appeal with the permission of the High Court. The decision of the High Court whether to grant permission is final. *The right to appeal all the way to the Court of Appeal will … remain for interlocutory applications that could affect the final outcome of the case.* [emphasis added]

45 This approach ensured that interlocutory applications, which usually do not involve novel or important points of law, were not unnecessarily taken all the way to the Court of Appeal, leading to a waste of judicial time.[47]

46 The Court of Appeal found that this view was clearly reflected in the SCJA itself, giving the examples of: (a) an application for summary judgment where no appeal was allowed to the Court of Appeal where the application was refused, but where no leave to appeal was required where summary judgment is ordered; and (b) an application to amend pleadings where no appeal may be brought to the Court of Appeal where leave to amend was granted but where leave to appeal may be obtained to appeal to the Court of Appeal where leave to amend was refused.[48]

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44 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [14].

45 Cap 1, 2002 Rev Ed.

46 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [17], quoting *Singapore Parliamentary Debates, Official Report* (18 October 2010) vol 87 at cols 1367–1395 (Associate Professor Ho Peng Kee, Senior Minister of State, Ministry of Law and Ministry of Home Affairs).

47 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [18].

48 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [19]–[20].

47 Applying this approach to an application for leave to commence judicial review, the Court of Appeal held that because the refusal of leave meant that there "was nothing more to proceed on" and that the "substantive rights of the parties had come to an absolute end unless there could be an appeal", the application for leave to commence judicial review was not an "interlocutory application" under para (*e*) of the Fifth Sched of the SCJA.[49]

48 Accordingly, no leave to appeal was required before the appellant filed an appeal against the decision of the High Court refusing leave to commence judicial review proceedings.

49 The Court of Appeal then proceeded to deal with the respondent's other argument based on O 53 r 8 of the Rules of Court,[50] which reads as follows: "An appeal shall lie from an order made by a Judge in Chambers under this Order as it does in the case of an interlocutory order."

50 The respondent argued that O 53 r 8 required an appeal against a judge's order in an application for leave to commence judicial review to be made in the same manner as an appeal against an interlocutory order of a judge made in other proceedings, which was specified by s 34(2)(*d*) of the SCJA read with para (*e*) of the Fifth Sched.[51]

51 In other words, the argument was that the appellant was required to apply for leave from the High Court to appeal against the judge's refusal to grant leave to commence judicial review. To read "interlocutory application" under para (*e*) of the Fifth Sched to exclude an application for leave to commence judicial review would render O 53 r 8 "nugatory and otiose".[52]

52 The Court of Appeal disagreed. It compared O 53 r 8 with its predecessor provision, which revealed that the reference to "interlocutory order" was to link it with the previous s 34(1)(*c*) of the SCJA containing the requirement for a no-further-arguments certification for "an interlocutory order" made by a judge in chambers.[53]

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49 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [21].

50 Cap 322, R 5, 2006 Rev Ed.

51 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [23].

52 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [24].

53 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [26]–[27].

53 Given that this provision had since been removed along with the requirement for a no-further-arguments certification by the 2010 SCJA amendments, O 53 r 8 was a "relic of the past" and could not be used to undermine the strong parliamentary intention that an appeal to the Court of Appeal will remain as of right for orders made at interlocutory applications which will finally dispose of the substantive rights of the parties.[54]

54 Finally, the Court of Appeal dismissed the respondent's third argument that there were compelling reasons why leave should be required against decisions in applications for leave to commence judicial review proceedings based on the low threshold for such an application to succeed, in view of the "clear purpose underlying the relevant provisions in the SCJA".[55]

55 Interestingly, the Court of Appeal made no reference to earlier authorities interpreting the phrase "interlocutory order" to inform its interpretation of the phrase "interlocutory application".[56] Both these phrases became areas of focus in the subsequent decision of *Dorsey James Michael*.

B. Dorsey James Michael

56 The main issue before the Court of Appeal in *Dorsey James Michael* was whether the High Court judge's order that the respondent be at liberty to serve on the appellant pre-action interrogatories pursuant to O 26A r 1 of the Rules of Court[57] and that the Appellant answer the same was appealable.

57 The respondent argued that pre-action interrogatories were "interrogatories" within the meaning of para (*i*) of the Fourth Sched and hence an order of a judge giving such interrogatories was non-appealable.[58]

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54 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [28]–[29]. See also Jeffrey Pinsler, *Principles of Civil Procedure* (Academy Publishing, 2013) at pp 947–948.

55 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [30]–[32].

56 See Douglas Chi, "Clarification on Leave to Appeal Regime in Respect of Interlocutory Matters – *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] SGCA 24" (April 2013) Issue 1 *Singapore Law Watch Commentary* at 3–4 <http://www.singaporelawwatch.com/slw/index.php/commentaries> (accessed 5 May 2013).

57 Cap 322, R 5, 2006 Rev Ed. Order 26A r 1 bears the heading "Interrogatories against other person".

58 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [13].

58 The respondent relied primarily on the plain and ordinary meaning of the statutory text but also argued, in the alternative, that a purposive interpretation would support its argument.[59]

59 The Court of Appeal reaffirmed the *locus classicus* of *Public Prosecutor v Low Kok Heng*[60] and held that s 9A(1) of the Interpretation Act[61] mandated that the courts take a purposive interpretation, which must take precedence over any other common law principles of statutory interpretation, including the plain meaning rule.[62]

60 Under the purposive approach, the Court of Appeal stated that reference may be made to extrinsic materials such as parliamentary debates even if, on a plain reading, the words of the statutory provision are unambiguous or do not produce unreasonable or absurd results.[63]

61 The Court of Appeal then turned to extrinsic materials to discern the object and purpose underlying the enactment of s 34(1)(*a*) and para (*i*) of the Fourth Sched to the SCJA, namely, the recommendations of the two judiciary-led committees mentioned earlier, as well as the second reading speech of the relevant amendment bill made by Associate Professor Ho Peng Kee.

62 After summarising the positions under the previous version of the SCJA and the new approach provided for by the 2010 SCJA amendments, the Court of Appeal stated that Parliament's intention in passing the amendments "was to remedy the problems associated with s 34(1)(*c*) of the old SCJA",[64] namely: (a) the proliferation of appeals to the Court of Appeal in respect of interlocutory orders; (b) the technical and potentially draconian effects of the requirement for the no-further-arguments certification; and (c) the removal of the dichotomy between "final" and "interlocutory" orders in favour of a calibrated, categories-based approach.[65]

63 Against that background, the Court of Appeal held that determining whether or not an order for pre-action interrogatories fell within para (*i*) of the Fourth Sched to the SCJA turned on the anterior question of whether an application to administer pre-action interrogatories was an "interlocutory application" for the purposes of the SCJA.[66]

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59 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [14]–[15].
60 [2007] 4 SLR(R) 183 at [56]–[57].
61 Cap 1, 2002 Rev Ed.
62 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [18].
63 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [19].
64 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [45].
65 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [46]–[49].
66 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [50].

64 The Court of Appeal cited *OpenNet* and agreed with the observation there that the legislative scheme introduced by the 2010 SCJA amendments and set out in the new s 34 and the Fourth and Fifth Scheds to the SCJA, in so far as it curtailed the rights of appeal, was only intended to apply to orders *made at the hearing of interlocutory applications*.[67] Based on a purposive approach, para (*i*) of the Fourth Sched referred to an order giving or refusing interrogatories that is *made at the hearing of an interlocutory application for interrogatories*.[68]

65 Such a reading was also consistent with a contextual approach because the Fourth and Fifth Scheds ought to be understood together with para (*e*) of the Fifth Sched, which establishes the default requirement that leave of the High Court judge is required before an appeal can be brought to the Court of Appeal from orders made at the hearing of interlocutory applications.[69]

66 Given that the respondent had conceded that an application for pre-action interrogatories was not an "interlocutory application", the Court of Appeal recognised that this was sufficient basis for it to dismiss the application to strike out the appeal.[70]

67 Nevertheless, the Court of Appeal proceeded to explain why the concession was properly made, after referencing legal dictionaries as well as the second reading speech of Associate Professor Ho Peng Kee, as follows:[71]

> As a matter of principle, an application to administer pre-action interrogatories is not an application made *between* the time a party files a civil case in court and when that case is finally heard for disposal. Rather, it is an application made by way of originating summons and its only end is the particular relief sought in the originating summons. Once the application for such relief has been considered and ruled upon by the court, that matter ends and those proceedings are not followed by any other steps leading to any trial or further disposal of that matter. [emphasis in original]

68 The Court of Appeal noted that this position was consistent with its earlier decision in *Maldives Airport Co Ltd v GMR Malé International Airport Pte Ltd*[72] and the *dicta* it expressed in *Wellmix Organics (International) Pte Ltd v Lau Yu Man*[73] ("*Wellmix Organics*").[74]

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67 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [51]–[52].
68 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [54].
69 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [53]–[54].
70 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [57].
71 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [58]–[60].
72 [2013] 2 SLR 449, in which the Court of Appeal decided on a preliminary objection that an application for an injunction was not an "interlocutory application"

(*cont'd on the next page*)

69 The Court of Appeal further took pains to explain why it did not accept the possible argument that "an application for pre-action interrogatories is in substance one that is preliminary and incidental to proceedings which may subsequently be commenced by the party seeking to administer those interrogatories".[75]

70 First, substantive proceedings may not necessarily be commenced by the party seeking to administer pre-action interrogatories.

71 Second, interrogatories may be administered before the commencement of proceedings against a person not a party to those proceedings pursuant to O 26A r 1(5) of the Rules of Court[76] and consistent with the principle established by the House of Lords in *Norwich Pharmacal Co v Customs and Excise Commissioners*.[77]

72 Additionally, the Court of Appeal saw fit to deal with the interpretation of para (*e*) of the Fifth Sched to the SCJA (raised by the appellant's alternative contention that the 2010 SCJA amendments were intended only to restrict the right of appeal against interlocutory orders and not final orders) to provide guidance for future cases.[78]

73 The question the Court of Appeal posed for itself was: "does the requirement of leave under paragraph (*e*) of the Fifth Schedule to the SCJA apply regardless of the type of order that is made?"[79] Referring again to the second reading speech of Associate Professor Ho Peng Kee and agreeing with the earlier observations in *OpenNet*, the Court of Appeal answered the question in the negative as the "very purpose of the 2010 amendments was to restrict appeals to the Court of Appeal from interlocutory *orders*" [emphasis in original].[80]

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because there would be nothing further for the court to deal with once the injunction had been either granted or refused.

73 [2006] 2 SLR(R) 525 at [16], where the Court of Appeal commented that it is possible that an order granted in one proceeding may be interlocutory and yet the same nature of order granted in another proceeding may be final, stating as an example that although an order made for discovery in the course of an action for breach of contract may be an interlocutory order, one that was made in a proceeding instituted purely to obtain pre-action discovery would be a final order because it "disposes of everything in the proceeding".

74 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [61]–[65].

75 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [66]–[72].

76 Cap 322, R 5, 2006 Rev Ed.

77 [1974] AC 133.

78 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [75] and [77].

79 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [79].

80 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [79]–[91].

74 Accordingly, "order" in para (*e*) of the Fifth Sched, should be read as "interlocutory order" in the light of its purpose and context.

75 Perhaps making the most of its opportunity to clarify the approach to s 34 of the SCJA, the Court of Appeal further took on what it viewed to be an anomalous exception to the principles that a party applying for leave to appeal against an order or a judgment made by a judge should file his application to the judge within seven days of the order or judgment;[81] and that the order of the High Court giving or refusing leave is final.[82] That exception was that where an *ex parte* application is refused at first instance, the applicant can renew the application before the Court of Appeal within seven days after the date of hearing under O 57 r 16(3) of the Rules of Court.[83]

76 In the Court of Appeal's view, given that "*ex parte* applications are virtually always interlocutory in nature", legislative intervention would be desirable, because where a party is refused leave to appeal by the High Court judge who heard the application, there is no reason why he should not be allowed to renew his application for leave before the Court of Appeal on such terms and in such manner as that court may decide.[84]

77 Finally, the Court of Appeal summarised the principles to be adopted in the interpretation of s 34 of the SCJA, read with the Fourth and Fifth Scheds to the SCJA, as follows:[85]

> (a) Ordinarily, pursuant to s 29A of the SCJA, any judgment or order of the High Court is appealable as of right to the Court of Appeal. This, however, is subject to any provision in the SCJA or any other written law to the contrary.
>
> (b) Where interlocutory applications are concerned, ss 34(1)(*a*) and 34(2)(*d*) of the SCJA, read with the Fourth and Fifth Scheds respectively, are examples of such provisions to the contrary. These provisions prescribe that particular orders are either non-appealable or appealable to the Court of Appeal only with leave.
>
> (c) Where specific provision has been made in s 34 of the SCJA and in the Fourth and Fifth Scheds, that will apply on its terms, save that para (*i*) of the Fourth Sched and para (*c*) of the

81 See O 56 r 3(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).
82 See s 34(2B) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed).
83 Cap 322, R 5, 2006 Rev Ed; *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [92]–[95].
84 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [97].
85 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [98].

Fifth Sched apply only to orders made upon interlocutory applications.

(d) In relation to the opening words of para (*e*) of the Fifth Sched to the SCJA, the reference to "order" is to be read as a reference to an interlocutory order.

(e) Where an order is not stipulated as being non-appealable or appealable only with leave, an appeal to the Court of Appeal will lie as of right.

IV. Analysis of the two decisions

78 As mentioned, *OpenNet* and *Dorsey James Michael* are the first two Court of Appeal decisions pronouncing on the interpretation of s 34 of the SCJA after the 2010 SCJA amendments.

79 Notably, in both cases, the Court of Appeal prefaced their analyses by citing *Blenwel Agencies Pte Ltd v Tan Lee King*[86] and emphasising that a court is a creature of statute that is only seised of the jurisdiction conferred upon it by statute.[87]

80 What can be inferred from this is that it is absolutely crucial to have a proper and clear understanding of s 34 of the SCJA as well as the Fourth and Fifth Scheds to the SCJA to determine whether a judgment or order of the High Court is appealable, non-appealable or only appealable with leave (that is to say, whether the Court of Appeal has or simply does not have the jurisdiction to hear an appeal or not for the judgment or order in question, since jurisdiction in this instance can only be derived from the SCJA).

81 In respect of orders in interlocutory applications, an understanding of para (*e*) of the Fifth Sched is especially important because that paragraph requires leave to appeal to be obtained unless otherwise provided for.

82 The discussion below identifies four aspects of *OpenNet* and *Dorsey James Michael* that warrant further investigation in subsequent decisions: (a) the purposive approach adopted by the Court of Appeal; (b) the framework for determining whether an order or application is "interlocutory"; (c) the relationship between the Rules of Court and the SCJA; and (d) possible future changes to the SCJA.

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86 [2008] 2 SLR(R) 529.

87 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [7]; *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [10]. See also *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 at [14].

A. The re-affirmation of the importance of the purposive approach in interpreting statutes

83 In determining whether a judgment or order of the High Court is appealable, non-appealable or only appealable with leave, the Court of Appeal in *OpenNet* and *Dorsey James Michael* emphasised the primacy of the purposive approach to statutory interpretation pursuant to s 9A(1) of the Interpretation Act.[88] This aspect of the cases is uncontroversial and has been affirmed several times in earlier cases.[89]

84 However, this seemingly technical point requires closer examination because the purposive approach formed the fundamental basis of the Court of Appeal's analysis, and in this regard it is submitted that there remains further room for clarification of the *meaning of the purposive approach* and its relationship with the *reference to extrinsic material* in aid of interpretation.

85 In the Court of Appeal's application of the purposive approach in both *OpenNet* and *Dorsey James Michael*, it referred extensively to extrinsic materials such as the second reading speech made by Associate Professor Ho Peng Kee and the recommendations of the two judiciary-led committees earlier mentioned.

86 The *type* of extrinsic material the Court of Appeal referred to is uncontroversial and may be justified by reference to s 9A(3) of the Interpretation Act.[90] The second reading speech made by Associate Professor Ho Peng Kee was clearly permissible under s 9A(3)(*c*) of the Interpretation Act and the recommendations of the two judiciary-led committees may be argued to be permissible based on a purposive interpretation of s 9A(3). Although there is no listed category of materials in s 9A(3) that describe the recommendations of the two judiciary-led committees, s 9A(3) does not purport to be exhaustive but to "include" the listed materials.[91]

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88 Cap 1, 2002 Rev Ed.

89 See *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803; *Planmarine AG v Maritime and Port Authority of Singapore* [1999] 1 SLR(R) 669 and *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183. However, it cannot be said that all the cases have consistently and faithfully applied the purposive approach in the interpretation of statutory provisions that have come before then: see, *eg*, Chen Siyuan & Nathaniel Khng, "Possession and Knowledge in the Misuse of Drugs Act: *Nagaenthran a/l K Dharmalingam v Public Prosecutor*" (2012) 30 Sing L Rev 181 at 186–189.

90 Cap 1, 2002 Rev Ed.

91 Goh Yihan, "Statutory Interpretation in Singapore – 15 Years on from Legislative Reform" (2009) 21 SAcLJ 97 at 121–123, para 25.

87 Given that the common thread running through all the listed materials is that of relevance, the recommendations of the two judiciary-led committees should be regarded as relevant because they were referenced by Associate Professor Ho Peng Kee in the second reading speech as providing the basis for the proposed amendments. Accordingly, the *type* of extrinsic material that the Court of Appeal referred to in *OpenNet* and *Dorsey James Michael* was, like the purposive approach, also uncontroversial.

88 What requires clarification is the *basis* for reference to such extrinsic material – this was left unclear by the Court of Appeal in both cases. Section 9A(2) of the Interpretation Act[92] describes the circumstances in which consideration may be given to relevant extrinsic material as follows:

> (*a*) to *confirm* that the meaning of the provision is *the ordinary meaning* conveyed by the text of the provision *taking into account its context* in the written law and the *purpose or object* underlying the written law; or
>
> (*b*) to *ascertain* the meaning of the provision when —
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the *ordinary meaning* conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law *leads to a result that is manifestly absurd or unreasonable.*
>
> [emphasis added]

89 It has been argued that there is a distinction between the purposive approach, and the *circumstances in which extrinsic materials may be utilised in accordance with the purposive approach.*[93] Section 9A(1) of the Interpretation Act[94] does not prescribe *how* the purposive approach is to be exercised but only provides for its *use*. In contrast, s 9A(2) of the Interpretation Act prescribes the circumstances in which recourse may be had to extrinsic materials.

90 As will be explained below, in *Dorsey James Michael*, the Court of Appeal did not make such a distinction, whereas in *OpenNet*, the Court of Appeal seemed to appreciate the distinction but it did not address the two specific purposes set out in sub-paras (*a*) and (*b*), focusing only on the preamble that the court may give consideration to

92 Cap 1, 2002 Rev Ed.

93 Goh Yihan, "Statutory Interpretation in Singapore – 15 Years on from Legislative Reform" (2009) 21 SAcLJ 97 at 109–111 and 124–125, paras 12 and 28.

94 Cap 1, 2002 Rev Ed.

"any material not forming part of the written law [that] is capable of assisting in the ascertainment of the meaning of the provision".

91 In *Dorsey James Michael*, the Court of Appeal had recourse to extrinsic material to interpret "interrogatories" in the Fourth Sched to the SCJA and the reference to "order" in the Fourth and Fifth Scheds to the SCJA. The Court of Appeal cited the cases of *Constitutional Reference No 1 of 1995*[95] and *Planmarine AG v Maritime and Port Authority of Singapore*[96] for the proposition that reference may be made to extrinsic materials even if the words of the statutory provision are unambiguous or do not produce unreasonable or absurd results. This was certainly correct as these circumstances were contained in s 9A(2)(*b*) of the Interpretation Act[97] – there was still s 9A(2)(*a*) of the Interpretation Act.

92 However, s 9A(2)(*a*) required the extrinsic material to be used to *confirm that the meaning of the provision is the ordinary meaning* conveyed by the text taking into account its context in the written law and the purpose or object underlying the written law.

93 It seemed that the Court of Appeal took it as a matter of course that reference to extrinsic material was part of the purposive approach and, in addition to the purposes stated in s 9A(2), extrinsic material may be referenced to *ascertain the purpose of object underlying the written law*. This could have been an opportunity for the Court of Appeal to clarify the *meaning* of the purposive approach and what it entailed.

94 One way to read s 9A(2) as providing a very broad assisting role in interpretation and accordingly permitting reference to extrinsic material whenever the purposive approach is applied has been suggested by one academic as follows:[98]

> This approach could be justified on the basis that if, say, the purposively reached meaning was not ambiguous or absurd, and the court seeks extrinsic materials to confirm this meaning but, upon doing so, realises that there is now a better meaning to promote the purpose and object of the Act. If so, there is, by definition, an ambiguity or absurdity such that s 9A(2)(*b*) operates seamlessly to permit the court to adopt a different meaning. It might be better to treat ss 9A(2)(*a*) and 9A(2)(*b*) as operating seamlessly with one another, with one ready to take over the other should the circumstances permit upon the consideration of the extrinsic materials.

95 [1995] 1 SLR(R) 803.
96 [1999] 1 SLR(R) 669.
97 Cap 1, 2002 Rev Ed.
98 Goh Yihan, "Statutory Interpretation in Singapore – 15 Years on from Legislative Reform" (2009) 21 SAcLJ 97 at 130, para 37.

95 In *OpenNet*, the Court of Appeal appeared to distinguish between the purposive approach and the reference to extrinsic materials as it stated as follows before referring to the second reading speech:[99]

> According to s 9A(2) (read with s 9A(3)(*c*)) of the Interpretation Act, consideration may be given to a piece of material which is 'capable of assisting in the ascertainment of the meaning of the provision', including 'the speech made in Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in Parliament'.

96 However, this statement does seem to ignore the specific purposes described in sub-paras (*a*) and (*b*). The Court of Appeal could have simply explained which it was proceeding under for better clarity. In the circumstances, it was possible that the reference to extrinsic material in this case fell within the confirmatory purpose described in sub-para (*a*), or within the first limb of sub-para (*b*) because the SCJA did not define the phrase "interlocutory application" and the legal dictionary definitions did not satisfactorily resolve the issue.

97 Alternatively, the Court of Appeal could also have adopted the approach suggested above of reading s 9A(2) broadly to cover all conceivable circumstances. In that way, the purposive approach under the Interpretation Act would always involve reference to extrinsic material – the only controlling mechanism would then be how much weight to place on such material pursuant to s 9A(4) of the Interpretation Act.[100]

B. "Interlocutory orders" and "interlocutory applications"

98 Due to para (*e*) of the Fifth Sched, the default position in the absence of express provision for all orders made in interlocutory applications (generally understood to mean applications made before the substantive trial)[101] is that they are appealable only with leave of court.[102]

99 *OpenNet* and *Dorsey James Michael* seek to provide clarification as to how "interlocutory application" in para (*e*) of the Fifth Sched and "order" under para (*i*) of the Fourth Sched and para (*e*) of the Fifth Sched ought to be interpreted. However, one may question whether both decisions have managed to succeed in doing so.

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99 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [16].

100 Cap 1, 2002 Rev Ed.

101 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [14].

102 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [46].

100 The test laid down in *OpenNet* for interlocutory applications within the meaning of the SCJA appears to be applications that do not "have the effect of finally disposing of the substantive rights of the parties".[103]

101 If this test is not satisfied, that is, the application *has* the effect of finally disposing of the substantive rights of the parties, then an order made in that application should be appealable as of right. If the test is satisfied, then one must examine whether the order is appealable with leave or non-appealable by reference to the Fourth Sched of the SCJA.

102 This test for an "interlocutory application" in *OpenNet* appears to be taken from the case of *Bozson v Altrincham Urban District Council*[104] ("*Bozson*"), although the Court of Appeal did not reference it. In *Bozson*, Lord Alverston CJ had formulated a test for distinguishing between an interlocutory and final order as follows:[105]

> Does the judgement or order, as made, finally dispose of the rights of the parties? If it does ... it ought to be treated as a final order; but if it does not, it is then ... an interlocutory order.

103 The *Bozson* test was approved by the Singapore Court of Appeal in the pre-2010 SCJA amendments case of *Wellmix Organics* after considering the other tests developed in the case law seeking to distinguish between an "interlocutory" and "final" order.

104 It could be that the Court of Appeal deliberately chose not to refer to the *Bozson* test because it regarded the present SCJA as introducing a new regime where that test was not strictly relevant. As it later explained, the reference to "interlocutory order" in O 53 r 8 of the Rules of Court[106] was a "relic of the past" and part of the regime under the former s 34(1)(*c*) of the SCJA where the no-further-arguments certification was required for an "interlocutory order". Nevertheless, as a matter of substance, the test applied in *OpenNet* for an

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103 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [18].

104 [1903] 1 KB 547.

105 *Bozson v Altrincham Urban District Council* [1903] 1 KB 547 at 548. See also Jeffrey Pinsler, *Principles of Civil Procedure* (Academy Publishing, 2013) at p 947:

> The principle governing [appeals is]: 'The resources necessary for an appeal must be justified by the amount or value at stake or the significance of the issue to be raised before the appellate court.' The principle involves considerations such as the need for a further appeal, the relationship between the interlocutory matter and the substantive issues in the case, the finality of the order, whether the applicable legal rules are straightforward or complicated, and the impact of the order on the other party.

106 Cap 322, R 5, 2006 Rev Ed.

"interlocutory application" seems to be another re-incarnation of the familiar *Bozson* test.

105 It may be said then that although the Court of Appeal may not have intended it, the effect of *OpenNet* was to re-introduce the difficulty of trying to distinguish between "interlocutory" and "final" orders.[107]

106 The Court of Appeal's later decision of *Dorsey James Michael* arguably raises more questions in this respect. Oddly enough, despite expressly stating earlier on that one of the purposes of the 2010 SCJA amendments was to remove the dichotomy between "interlocutory" and "final" orders, the Court of Appeal in *Dorsey James Michael* proceeded to endorse and apply the *Bozson* test as well as *Wellmix Organics* in determining whether or not an application to administer pre-action interrogatories was an interlocutory application within the meaning of the SCJA.[108]

107 Further, the Court of Appeal later expressly re-introduced the phrase "interlocutory order" to the SCJA by holding that "order" as referenced in para (*i*) of the Fourth Sched and para (*e*) of the Fifth Sched referred to "interlocutory orders" made in "interlocutory applications".[109]

108 Ironically, one commentator had observed after considering the case of *OpenNet* that "it is absolutely clear now that the language of 'interlocutory order' is no longer applicable under the new legislative framework".[110]

109 The High Court in *Chen Chun Kang v Zhao Meirong*[111] also seemed to appreciate that a key distinction between the former s 34 of the SCJA and the present version was that the former required the court to apply the test of whether a *judgment or order* was interlocutory or final, whereas the latter required the court to decide whether the *summons* before it was an "interlocutory application".[112]

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107 See *Downeredi Works Pte Ltd v Holcim (Singapore) Pte Ltd* [2009] 1 SLR(R) 1070 at [34] and *Chen Chun Kang v Zhao Meirong* [2012] 1 SLR 817 at [32].

108 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [63]–[65].

109 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [79]–[85].

110 In Douglas Chi, "Clarification on Leave to Appeal Regime in Respect of Interlocutory Matters – *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] SGCA 24" (April 2013) Issue 1 *Singapore Law Watch Commentary* at 3–4 <http://www.singaporelawwatch.com/slw/index.php/commentaries> (accessed 5 May 2013), the author inferred this from the Court of Appeal's reasoning in *OpenNet*, in particular its failure to reference the *Bozson* test and *Wellmix Organics*.

111 [2012] 1 SLR 817.

112 *Chen Chun Kang v Zhao Meirong* [2012] 1 SLR 817 at [32]–[33].

110 However, it turns out that according to *Dorsey James Michael*, the Legislature's intention by way of the 2010 SCJA amendments was that only *interlocutory* orders made in *interlocutory* applications be subject to the catch-all provision in para (*e*) of the Fifth Sched and only *interlocutory* orders be captured by para (*i*) of the Fourth Sched (and by logical extension the entirety of the Fourth Sched).

111 Another possibly confusing aspect of reading both *OpenNet* and *Dorsey James Michael* is that one is left at a loss as to the test to apply to determine if an application is an "interlocutory application" within the meaning of the SCJA.

112 Apart from endorsing the *Bozson* test, the Court of Appeal in *Dorsey James Michael* also appeared to endorse the legal dictionary definitions for "interlocutory application", namely, an application that is "peripheral to the main hearing determining the outcome of the case"[113] or one that is "[d]uring the course of proceedings ... occurring between the initiation of the action and the final determination"[114] on the basis that they were consonant with the meaning attributed by Associate Professor Ho Peng Kee to that phrase in the second reading speech.

113 In contrast, the Court of Appeal in *OpenNet* had referred to similar dictionary definitions but stated that they "do not resolve the issue".[115]

114 The Court of Appeal in *Dorsey James Michael* then went on to decide that pre-action interrogatories were not "interlocutory applications" within the meaning of the SCJA because they were not "made *between* the time a party files a civil case in court and when that case is finally heard for disposal" [emphasis in original], and "[o]nce the application for such relief has been considered and ruled upon by the court, that matter ends ".[116]

115 Reading *OpenNet* and *Dorsey James Michael* together, one may argue that the legal dictionary definitions of "interlocutory application" still remain relevant and are perhaps an alternative to the "finally disposing of the substantive rights of parties" test.

116 Alternatively, it could also be that the various definitions referred to are merely factors or indicia to be considered rather than

113 *Jowitt's Dictionary of English Law* (Sweet & Maxwell, 3rd Ed, 2010).
114 *Oxford Dictionary of Law* (Oxford University Press, 7th Ed, 2009).
115 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [14].
116 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [60].

tests.[117] Regardless, as compared with the previous position under the SCJA, the present position does not appear to bring significant improvement in terms of certainty and clarity.

C. Relationship between the Rules of Court and the SCJA

117 In *OpenNet*, the Court of Appeal rejected the respondent's argument that if "interlocutory application" under para (*e*) of the Fifth Sched of the SCJA does not include an application for leave to commence judicial review by way of an originating summons, O 53 r 8 of the Rules of Court[118] would be rendered nugatory and otiose.

118 In its reasoning process, the Court of Appeal implicitly recognised that subsidiary legislation such as the Rules of Court cannot be used to arrive at an interpretation of the primary legislation that would not promote its object and purpose.

119 In fact, s 19(*c*) of the Interpretation Act[119] provides that "no subsidiary legislation made under an Act shall be inconsistent with the provisions of any Act". The Court of Appeal took the correct approach in examining the link of the predecessor provision of O 53 r 8 to the SCJA with the repealed s 34(1)(*c*) of the previous version of the SCJA to discover that O 53 r 8 appeared to be a "relic of the past".[120]

120 However, in *Dorsey James Michael*, the Court of Appeal was rather troubled by the "apparently anomalous exception", contained within O 57 r 16(3) of the Rules of Court,[121] to the proposition in s 34(2B) of the SCJA that the order of a High Court judge giving or refusing leave is final and that in O 56 r 3(1) of the Rules of Court[122] which requires a party applying for leave to appeal under s 34 of the SCJA to apply to the judge who gave the order or made the judgment at first instance.[123]

121 Order 57 r 16(3) provides that: "Where an *ex parte* application has been refused by the Court below, an application for a similar

117 See Douglas Chi, "Clarification on Leave to Appeal Regime in Respect of Interlocutory Matters – *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] SGCA 24" (April 2013) Issue 1 *Singapore Law Watch Commentary* at 4 <http://www.singaporelawwatch.com/slw/index.php/commentaries> (accessed 5 May 2013).

118 Cap 322, R 5, 2006 Rev Ed.

119 Cap 1, 2002 Rev Ed.

120 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [29].

121 Cap 322, R 5, 2006 Rev Ed.

122 Cap 322, R 5, 2006 Rev Ed.

123 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [93]–[95].

purpose may be made to the Court of Appeal *ex parte* within 7 days after the date of the refusal."

122 It is submitted that any anomaly can be cured by properly interpreting O 57 r 16(3) in the context of s 34 of the SCJA given s 19(*c*) of the Interpretation Act.[124]

123 The Court of Appeal read O 57 r 15(3) as meaning that a party in an *ex parte* application is entitled to two tiers of hearing including one before the Court of Appeal as of right. This is not necessarily true.

124 Section 34 of the SCJA deals with *types* of applications and would still apply regardless of whether the application in question was brought *inter partes* or *ex parte*. Order 57 r 16(3) can be read subject to s 34 of the SCJA, that is, to provide for the *mode* by which an *ex parte* application refused by the High Court may be made to the Court of Appeal where s 34 of the SCJA *does not* apply to require leave to appeal or render an application non-appealable.

125 Accordingly, O 57 r 16(3) would apply, for instance, to applications for freezing orders and search orders. It would also apply to applications for leave to appeal to which s 34(2) of the SCJA does not apply and where leave to appeal may be sought from the Court of Appeal. One example would be an application for leave to appeal against the decision of the High Court in proceedings under Pt X of the Women's Charter,[125] which may be obtained from the Court of Appeal pursuant to the Supreme Court of Judicature (Transfer of Matrimonial, Divorce and Guardianship of Infants Proceedings to District Court) Order 2007.[126]

126 However, where leave to appeal is required under s 34 of the SCJA read with the Fourth or Fifth Sched, then O 57 r 16(3) does not apply. Such a reading would be consistent with the object and purpose of s 34 of the SCJA.

127 It is therefore submitted that O 57 r 16(3) ought not to have troubled the Court of Appeal in *Dorsey James Michael* as the subsidiary legislation may be read consistently with the SCJA in the light of s 19(*c*) of the Interpretation Act.[127]

124 Cap 1, 2002 Rev Ed.
125 Cap 353, 2009 Rev Ed.
126 S 672/2007, para 6.
127 Cap 1, 2002 Rev Ed.

D. Possible future changes to the SCJA

128 The Court of Appeal in *Dorsey James Michael* invited future legislative change to the SCJA with its comment that it saw no reason why a party who is refused leave to appeal by a High Court judge who heard the application "should not be allowed to renew his application for leave before the Court of Appeal on such terms and in such manner as that court may decide".[128]

129 This statement plainly contradicts the proposition stated in s 34(2B) of the SCJA which the Court of Appeal alluded to earlier, that an order of a High Court judge giving or refusing leave under s 34(2) of the SCJA shall be final.

130 It also raises the question of whether the Court of Appeal intended its comment to apply to situations where a High Court judge, different from the judge making the order or giving the judgment appealed against, heard the application for leave.

131 If so, this would similarly contradict the proposition stated in O 56 r 3(1) of the Rules of Court,[129] and which was defended by Associate Professor Ho Peng Kee in Parliament during the second reading of the 2010 SCJA Amendment Bill,[130] that an application for leave to appeal should be made to the same judge who gave the order or made the judgment at first instance.

132 Taking the Court of Appeal's comment at its broadest, it appears that the Court of Appeal is suggesting, to some extent, a return to the former position before the 2010 SCJA amendments, where leave to appeal applications heard by High Court judges were not final as well as a change to the traditional practice[131] of the same High Court judge who

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128 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [97].

129 Cap 322, R 5, 2006 Rev Ed.

130 See *Singapore Parliamentary Debates, Official Report* (18 October 2010) vol 87 at col 1367 (Associate Professor Ho Peng Kee, Senior Minister of State, Ministry of Law and Ministry of Home Affairs), where it was stated, *inter alia*, as follows:

> Sir, first of all, I should say that the amendments do not introduce a new practice because this practice already exists – getting leave from the High Court Judge who hears the case. Indeed, I understand, this is also the practice in other countries, such as the UK. I think the key point really is that we must expect our High Court Judges who are men and women of experience and integrity to grant leave when it is justified. And, in fact, the High Court Judge who gave the original order and who is the one most familiar with the case is best placed to make this call as to whether the facts of legal issues raised merit further consideration by the Court of Appeal.

131 See *Singapore Parliamentary Debates, Official Report* (18 October 2010) vol 87 at col 1367 (Associate Professor Ho Peng Kee, Senior Minister of State, Ministry of Law and Ministry of Home Affairs).

made the order or gave the judgment being appealed against hearing the application for leave to appeal.

133 Although the basis for and the scope of its suggestion appears unclear, the authors would agree that this may be an appropriate time to review the new approach towards leave to appeal applications brought about by the 2010 SCJA amendments given that some circumstances relating to the justification for those amendments have changed.

134 For example, there have been recent changes introduced to the Court of Appeal practice by way of amendments to the Supreme Court Practice Directions,[132] and there has also been a shift "to a modified docket system of litigation"[133] as announced by Sundaresh Menon CJ at the beginning of the year. These changes will more likely than not increase the current workloads of the High Court and the Court of Appeal and require recalibration of the contents of the three-pronged categories approach.[134]

135 It is also worthwhile considering simplifying the current approach, which as described earlier, is cumbersome and requires cross-referencing between the text of s 34 and the Fourth and Fifth Scheds to the SCJA. Even if the Fourth and Fifth Scheds are to be maintained, it would be best if the lists do not themselves contain exceptions, or if they do, it should be specified whether in the exceptional circumstances the order is appealable as of right, non-appealable, or appealable only with leave of the court.

136 Finally, given the earlier observations that the cases of *OpenNet* and *Dorsey James Michael* appear to have re-introduced the distinction between "interlocutory" and "final" orders that the 2010 SCJA amendments had sought to remove as well as brought about some difficulty in terms of the appropriate test to apply to determine whether an order or application is "interlocutory" within the meaning of the SCJA, further legislative clarification may be desirable to provide an express definition of the phrases "interlocutory order" and "interlocutory application".

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132 See Supreme Court Practice Directions (Amendment No 1 of 2013) <http://app.supremecourt.gov.sg/default.aspx?pgID=4601> (accessed 5 May 2013).

133 See Response by Chief Justice Sundaresh Menon, Opening of the Legal Year 2013 and Welcome Reference for the Chief Justice (4 January 2013) at paras 31–32 <http://app.lsc.gov.sg/data/OLY%202013%20-%20CJ%20Speech%20OLY%20Welcome%20Reference.pdf> (accessed 5 May 2013).

134 See Chua Hui Han, Eunice, "Defining an 'Interlocutory Application' – *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] SGCA 24" (April 2013) Issue 2 *Singapore Law Watch Commentary* at 5–6 <http://www.singaporelawwatch.com/slw/index.php/commentaries> (accessed 5 May 2013).

V. Conclusion

137 *OpenNet* and *Dorsey James Michael* will unlikely be the last word on the proper interpretation of s 34 and the Fourth and Fifth Scheds to the SCJA. While possible future legislative changes are being awaited, the techniques of statutory interpretation contained within the Interpretation Act will have to suffice to determine whether an order made by a High Court judge is appealable as of right, non-appealable, or appealable only with leave of court.

138 In summary, a suggested practical approach to making such a determination based on the current positions in *OpenNet* and *Dorsey James Michael* is as follows:

(a) Where an application is "interlocutory" as ordinarily understood (that is, where the application is peripheral to the main hearing determining the outcome of the case, or one that occurs during the course of proceedings between the initiation of the action and the final determination), one will have to apply the tests in *OpenNet* and *Dorsey James Michael* (informed by the object and purpose of the 2010 SCJA amendments) to determine if the application *and* the order made in that application are "interlocutory" in nature within the meaning of the SCJA.

(b) If so, then pursuant to ss 34(1)(*a*) and 34(2)(*d*) of the SCJA, read with the Fourth and Fifth Scheds respectively, such "interlocutory" orders in "interlocutory" applications are either appealable only with leave of court or are non-appealable.

(i) The orders and applications that are non-appealable are stated in the Fourth Sched to the SCJA.

(ii) The orders and applications that are appealable only with leave of court are stated in the Fifth Sched to the SCJA.

(iii) Where no explicit reference is made to the order and application in question in the Fourth and Fifth Scheds to the SCJA, then the catch-all provision in para (*e*) of the Fifth Sched to the SCJA applies such that leave to appeal is required.

(c) If not, then the order made by the High Court in that application is appealable as of right pursuant to s 29A(1) of the SCJA.